COVER SHEET

Erosion at the Beach: Privacy Rights not just Sand

By Kelley Burton[1]

In August 2005, the Australian Standing Committee of Attorneys-General (SCAG) released a Discussion Paper entitled, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues*, and called for public submissions.[2] One of the instances causing concern was the covert photography of hundreds of children at South Bank Parklands (an artificial beach setting) in Queensland and the subsequent publication of the photographs on a website.[3] Even though the photographs did not contain images of the children's private parts or doing private acts (for example, showering, toileting or changing clothes), it caused community outrage because the photographs were taken without consent of the parents of the children and were placed on a website where a larger audience could view the photographs. Not only would a larger audience be able to view the photographs, but arguably a different type of audience to what the parents would have intended, for example, paedophiles and paraphiliacs. There were no links on this website to pornographic sites, but the producer shut the website down as a result of the media attention.[4] The erosion of privacy rights in a beach setting is not restricted to minors. Another example referred to in the Discussion Paper was topless women being photographed on a Sydney beach. This photographer was caught under a provision relating to offensive conduct.[5] There are no laws in Australia that prevent a person from taking a photograph of another person at the beach without the other person's consent or from disseminating the photograph on the internet. This issue is very relevant to adult victims as well as minors. Canadian studies have suggested that women and children are usually the victims.[6] A recent media statement by Linda Lavarch, Attorney-General and Minister for Justice, indicates that the new law reforms will protect adults and minors from being covertly filmed in private places, for example, changing rooms and toilets. It suggests that privacy rights will not be protected in public places such as the beach. This article focuses on the rights of topless female bathers, irrespective of age.

Reasonable Expectation of Privacy

Justice Lowe in the High Court of Australia defined public place in *Ward v* Marsh[7] as a place where "at the time in question members of the public may, because they are members of the public, go to the place if they chose".[8] With this definition in mind, can it be argued that there is no reasonable expectation of privacy at the beach simply because it is a public place? Calvert and Brown assert that there can be no reasonable expectation of privacy at the beach because it is a public setting where people gaze at other people wearing skimpy swimsuits as a favourite pastime.[9]

This argument is supported by the New Zealand Law Commission, which indicated that the New Zealand voyeurism offence proposals do not protect members of the community who bathe topless at a public beach because they cannot have a reasonable expectation of privacy. The New Zealand voyeurism offence proposals have been put forward in the Crimes (Intimate Covert Filming) Amendment Bill 2005 and they target the covert making, publishing or possessing an intimate visual recording without the consent of the person recorded. The first reading of this New Zealand Bill occurred in May 2005 and it was referred to the New Zealand Government Administration Committee for examination. The Bill applies when a

person intentionally or recklessly records another person who is naked or has exposed, partially exposed or clad solely in undergarments their genitals, pubic area, buttocks or female breasts.[10] They also apply when the person is engaged in intimate sexual, showering, toileting or other personal bodily activity that involves dressing or undressing.[11] A person may be justified in possessing an intimate visual recording if they have a reasonable excuse. Publishing, importing and exporting an intimate visual recording is justified if it is done to exercise or perform powers, duties or functions under any enactment. Numerous people are legally permitted to publish intimate visual recordings, for example, police, Customs officers, New Zealand Security Intelligence officers and employees, Department of Corrections officers, lawyers or agents giving advice about an intimate visual recording or giving advice or making representations for any civil or criminal proceedings, and the subject of an intimate visual recording.[12] At the time of writing, the second reading of the Bill had not taken place.

Similarly, the privacy rights of topless bathers at public beaches are not protected in Canada. The Canadian Bill C-2: An Act to Amend the Criminal Code (Protection of Children and other Vulnerable Persons) and the Canada Evidence Act provides for a voyeurism offence to surreptitiously observe or visual record a person and in circumstances that give rise to a reasonable expectation of privacy. It covers places where a person can be reasonably be expected to be nude or exposing genital organs, anal region or breasts or to be engaged in explicit sexual activity. The purpose of the recording could be for sexual gratification, commercial profit, harassment or another purpose. The Canadian proposal also includes publishing or possessing a voyeuristic recording. Notably, it contains two exemptions, they are when police officers are judicially authorised to conduct surveillance and where it serves the public good. The second reading of the Bill in the Senate occurred in June 2005.

Similarly, a topless bather in the United Kingdom would not be protected by the voyeurism offence, which came into force in May 2004, because one of its key elements is a reasonable expectation of privacy. The voyeurism offence prohibits a person from observing, recording, operating equipment for another person to observe, installing equipment or adapting a structure to observe or enable another person to observe, the private acts of another person without their consent for the purpose of sexual gratification.[13] A private act requires the person to be in a place where there is a reasonable expectation of privacy. It also requires that the person's genitals, buttocks or breasts be exposed or covered only by underwear, or that the person is using a toilet or doing a sexual act not usually done in public.

The Australian SCAG Discussion Paper suggests creating a voyeurism offence similar to the United Kingdom, New Zealand, and Canadian approaches. If Australia follows any of these approaches, the privacy rights of topless bathers at a public beach will not be protected. Should Australia recognise that there is a reasonable expectation of privacy in public places? The legend of Lady Godiva and Peeping Tom recognised that privacy rights could be protected in public places. In that legend, Lady Godiva rode naked through the town on horseback in accordance with the Lord's promise that he would reduce the taxes. Peeping Tom looked at Lady Godiva as she rode through the town and he was blinded for his disloyalty. Arguably, privacy rights in a public places is not an all or nothing concept, but involves a question of degree.[14] Some public beaches are more secluded and less crowded than others. It is possible to be on

public beach without anyone else in sight or without anyone paying attention.[15] Reasonable people are able to make an assessment of how public a beach is by taking into consideration the time of the day, weather conditions, how secluded the beach is, whether the beach is near buildings and whether they can see anyone else in sight. After making such an assessment, perhaps it could be concluded that topless bather at a public beach has impliedly consented to other members of the public observing them because they have chosen not to wear a top in a public place, but should it be inferred that the topless bather has surrendered all of their privacy rights? Should another member of the public be entitled to photograph them and disseminate the photograph on the internet?

Dissemination of a Permanent Record

Some have suggested that taking a photograph of a topless sunbather would simply be making a record of something that any member of the public was free to see.[16] However, McClurg argues that just because a person has exposed their body at the beach does not mean they are willing to expose their body to "other audiences or in other contexts".[17]

A photograph is very different to an observation because it is a more permanent record that may be viewed on subsequent occasions. A picture (photograph) paints a thousand words as compared to a naked eye that is likely to miss details in a transitory observation.[18] The advances in technology enable the photographer to quickly disseminate the photograph to a much wider audience and arguably a different type of audience than was present at the beach. Objectively, the harm (humiliation, embarrassment, anger, violation, anxiety, exploitation and invasion of privacy) to a topless bather associated with the dissemination of the photograph on the internet is much greater than the simply observing a topless bather at the beach. Harm is a forward-looking notion that "involves the impairment of a person's opportunities to engage in worthwhile activities and relationships, and to pursue valuable, self-chosen, goals".[19] The harm principle, as espoused by philosophers such as John Stuart Mill and Joel Feinberg,[20] should be used to justify criminal law reforms in Australia to protect privacy rights and prevent members of the public from taking unauthorised photographs of topless bathers at the beach and disseminating them on the internet. The criminal law reforms should not impose a total ban on photography at beaches in Australia as this would erode liberalism and prevent people from taking scenic photographs of the sand and waves. Perhaps the criminal laws could be drafted so that it is an offence to take a photograph of a topless bather at a public beach as the primary object unless you have their consent, or in the case of minors, the consent of the person who has care of the child. Obtaining the consent of the primary subjects in a photograph and respecting privacy are at the very least social rules.

Social Rules at the Beach

As a result of the inadequate criminal laws in Australia and the inadequacy of the approaches in the United Kingdom, New Zealand and Canada, topless bathers must hope that members of the public abide by unspoken social rules relating to "personal space in public spaces, civil inattention and limitations on starring."[21] The Naturist Photo Special Interest Group provides free beach etiquette, some of which is relevant to the unauthorised taking of photographs or making of film, for example:

> "Gawking, or staring at nude sunbathers, is impolite. It is always rude to stare at others, but it is especially so when you use binoculars or a camera to look at nude people…Leave nothing but footprints, take only memories…Many folks come to the beach to enjoy nature and do not want to be disturbed. It is OK to be friendly, but if someone doesn't seem to respond, please respect their right to privacy."[22]

Similarly, the Federation of Canadian Naturists provide behavioural guidelines and some of these are extracted below.

> "Gawking is impolite. It is OK to look but always rude to stare (particularly with binoculars or through a camera)…Get the permission of subjects before taking pictures...Respect the privacy of others. Many people come to enjoy nature and don't want to be disturbed. It is good to be friendly, but take your cues from their response and body language."[23]

Perhaps the majority of the public are likely to abide by these unspoken social rules, but there are bound to be members of the public, who will breach them.

Conclusion

The privacy rights of topless bathers at a public beach are being eroded because the criminal laws in Australia have not kept up with the pace of technology to prevent people from taking photographs of topless bathers and disseminating them on the internet. There are social norms to protect the privacy rights of topless bathers, but these are likely to be breached by members of the public. These social norms should feed into the proposed criminal law reforms and until the tide has turned, the main options for topless bathers this summer may be to slip on a shirt in support of the slip slop slap campaign[24] or use a tanning salon.

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[2] Standing Committee of Attorneys-General, 'Unauthorised Photographs on the Internet and Ancillary Privacy Issues' (2005) <http://www.ag.gov.au/agd/WWW/agdhome.nsf/0/86D0F0FBE6DE7B85CA25705700050C1F?OpenDocument> available on 25 August 2005.
[3] 'Parents warned over online beach photos', *The Age* 27 January 2005 .
[4] Standing Committee of Attorneys-General, 'Unauthorised Photographs on the Internet and Ancillary Privacy Issues' (2005) <http://www.ag.gov.au/agd/WWW/agdhome.nsf/0/86D0F0FBE6DE7B85CA25705700050C1F?OpenDocument> available on 25 August 2005 at [12].
[5] *Summary Offences Act 1988* (NSW), s 4.
[6] Department of Justice Canada, 'Voyeurism as a Criminal Offence: A Consultation Paper' (2002) 4 <http://canada.justice.gc.ca/en/cons/voy/toc.html> available on 25 August 2005.
[7] [1958] ALR 724.
[8] [1958] ALR 724 at 725.
[9] Justin Brown Clay Calvert, 'Video Voyeurism, Privacy, and the Internet: Exposing Peeping Toms in Cyberspace' (2000) 18 *Cardozo Arts and Entertainment Law Journal* 469 at 494.
[10] Crimes (Intimate Covert Filming) Amendment Bill 2005, s 216G.
[11] Crimes (Intimate Covert Filming) Amendment Bill 2005, s 216G.
[12] Crimes (Intimate Covert Filming) Amendment Bill 2005, s 216M.
[13] *Sexual Offences Act 2003* (UK), s 67(1)-(5).

[14] Elizabeth Paton-Simpson, 'Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places' (2000) 50 *University of Toronto Law Journal* 305 at 322.
[15] *Ibid* at 322.
[16] *Ibid* at 328.
[17] McClurg, 'Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places' (1995) 73 *NC Law Review* 989 at 990.
[18] McClurg, 'Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places' (1995) 73 *NC Law Review* 989 at 1042.
[19] GR Sullivan and AP Simester, *Criminal Law Theory and Doctrine* (2nd ed, 2003) at 10.
[20] *Ibid* at 8-9.
[21] Elizabeth Paton-Simpson, 'Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places' (2000) 50 *University of Toronto Law Journal* 305 at 326.
[22] Naturist Photo Special Interest Group, (1997) *Free Beach Etiquette*, Steven S Sparks <http://www.sss.org/naturist/page2.html> available on 25 August 2005.
[23] Federation of Canadian Naturists, (1997-2004) *Etiquette*, <http://www.fcn.ca/FCNFAQ.html#18> available on 25 August 2005.
[24] Queensland Cancer Fund, (2000) *Slip Slop Slap*, <http://www.qldcancer.com.au/Cancer_Info_and_Services/PED/SkinCancer.html> available on 25 August 2005.